In the

UNITED STATES CIRCUIT COURT OF APPEALS

For the Ninth District

No. 8835

FIDELITY AND GUARANTY FIRE CORPORATION, of Baltimore, a Corporation,

Appellant,

vs.

WILLIAM E. BILQUIST, JOHN MYHRE AND SIGNE MYHRE,

Appellees.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

APPELLEES' BRIEF

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STATEMENT OF THE CASE

The following statement is not intended to dispute the statement of the case contained in appellants' brief, but is only to add thereto and call to the attention of the court matters in evidence which appellees deem important.

The policy of insurance upon which this suit is

brought was written by F. E. Langer, an authorized agent of appellant, licensed pursuant to the laws of Washington. Langer had been for twenty years a banker at Port Orchard, Washington, made loans upon property, and in connection therewith wrote insurance. Prior to writing the insurance in question he inspected the Manchester Inn and appraised it. He knew it was an inn and knew that it was so used; also that it was not to be used exclusively as a dwelling when he placed the policy of insurance thereon. Langer's bank and insurance office were one and the same place of business. His bank held a mortgage on the property and the policy was kept in his possession, as President of this bank in the same place of business where the insurance was written. Langer had recently, before the date of the policy, accepted the mortgage and knew both the Myhres and the Bilquists and was fully aware and had direct knowledge of their interest. He had discussed with Myhre the matter of placing Bilquist in this inn and was thoroughly cognizant of all the facts and circumstances pertaining both to the nature of the property, both real and personal, its proposed use, occupancy, and ownership. No application for this insurance was made, the agent simply undertook to insure it according to his own idea. After he had done so he drew the premium from Myhre's bank account.

The so-called beer parlor consisted only of a short

bar installed in one corner of the dining-room with room for six stools in front of it. (Tr. 103). No fire producing apparatus was placed in the building in connection with the beer apparatus and the fire itself origniated in the basement of the building, in the opposite corner from where the dining-room was situated, in the night long after closing hours.

ARGUMENT

In this case the appellant misconceives the theory on which the appellees proceeded, namely,—the theory of estoppel. Appellees say they made no representations whatsoever, but that the company, by its agent, gathered its own information and wrote its own policy. That the agent of the appellant had full power and authority to write a policy upon the property covered, and the appellant, having given him that power, is estopped to say that his mistake in describing the property insured can now be made the basis of a defense to this action.

WASHINGTON DECISIONS CONTROL IN THIS CASE

In addition to the case of *Erie Railroad Company vs. Tompkins,* Sup. Ct. Adv. Op. Law Ed. Vol. 82, p. 787, the Supreme Court of the United States again in the case of *Ruhlin vs. New York Life,* Vol. 82, Law Ed. No. 16, p. 823, decided on May 2, 1938, holds that federal courts

in dealing with questions of general commercial law, such as the construction of contracts of insurance, are bound to follow the decisions of the appropriate state court, and that this rule applies though the question arises either in an action at law or a suit in equity.

DEFINITION OF AGENT

Rem. Rev. Stat., 7033 (P. C. 2909), defining certain insurance terms, provides:

> " 'Agent,' 'insurance agent' or 'local agent' is a person, copartnership or corporation, duly authorized and commissioned by an insurance company, to solicit applications for and effect insurance in the name of the company, and to keep a complete record of all such transactions, and to discharge such other duties as may be vested in or required of the agent by said insurance company."

It is unlawful for an insurance company admitted to do business in this state, to write, place, or cause to be written or placed, any policy of insurance except through a duly authorized agent. Rem. Rev. Stat. 7080 (P. C. 2943).

In the case at bar, the agent Langer was a duly authorized agent and licensed under the laws of the State of Washington, (Tr. 115). In writing this policy his principal was undisclosed to the appellees. He asked for the business, testified he knew the property, (See Tr. 117 and 124 and 125), chose the form of policy, and placed

it in his bank with the mortgage he had written upon the property. (Tr. 115).

KNOWLEDGE OF THE AGENT IS IMPUTED TO THE PRINCIPAL

In the case of *Gaskell vs. Northern Insurance Company,* 73 Wash. 668, 132 P. 643, the agent wrote a policy on the separate property of the wife but by mistake wrote it in the name of the husband. The agent testified that he knew the true ownership of the property "but unthinkingly" wrote it in the wrong name. The Court held that such knowledge bound the principal and that the policy in an action at law would be deemed to be reformed and enforced as it was written. This doctrine was followed in the case of *Harper vs. Fireman's Fund Insurance Company,* 154 Wash. 77; 280 P. 743.

That case is in many respects parallel to this case in that the insurance agent was well acquainted with the plaintiff's business and for many years placed insurance on his lumber yard. The policy contained a clear space provision, namely: that there was to be maintained a clear space of 300 ft. between lumber and structures. This would have necessitated an increased rate of $3.27. No representations were made by the assured and the agent undertook to insure the lumber and fix the rate. When the fire occurred the policy was operative under the lesser

rate, yet the Court held that the agent attempted and intended to cover the particular lumber destroyed. They charged the premium fixed by the rating bureau to respondent's bank and collected the premium they deemed proper. The agency thus did not exceed its power but simply made a mistake and charged a lower rate to cover the risk when it should have written and delivered a different form of policy and charged a different rate. The court held, all facts having been disclosed and all conditions known, the knowledge of the agent was the knowledge of the principal and the mistake in the form of the policy should be charged to the company.

In *Miller vs. United Pacific Casualty Company,* 187 Wash. 629, 60 P. (2d) 714, this doctrine is again followed. In that case the agent undertook to transfer the policy of insurance from one automobile to another, owned by a different party, and did so by simply attaching a rider. Although the policy did not run to the owner of the car and although the policy on its face provided that it could not thus be transferred the Court held that the agent acted on his own initiative and did in an improper manner what he intended to do, namely: Cover this particular car, and at p. 638 states as follows:

> "The minds of the parties had fully met upon what the coverage was to be, and the contract was closed upon that understanding. It was never con-

templated by the parties that they should execute an abortive or illegal contract."

And likewise on page 638 the Court quotes from 2 Mechem on Agency (2nd ed.) 1397, 1813, which was the rule followed by the trial court in this case and upon which the jury were instructed.

ESTOPPEL

In each of the above cases cited up to this point in this brief, the Court held that the mistake of the agent was the mistake of the company and when they accepted the premium which was fixed by their own rating bureau they were estopped to deny the legality of the policy.

In the case of *Gattavara vs. Gen. Ins. Co. of America,* 166 Wash. 691; 8 P. (2d) 421, which was an action at law tried by a jury where the policy was issued to the plaintiff as owner of a truck, whereas his interest was only that of mortgagee, the company defended on the ground that the interest of the assured was other than an unconditional and sole ownership. The reply was that the company's agent knew what the interest of the assured was and through mistake and neglect failed to properly place it in the policy. The Court held that the question of whether the agent knew of the nature of the assured's interest was a question to be submitted to the jury and that since the company received and

retained the premium it was estopped to deny liability. Citing the case of *Reynolds vs. Canton Insurace Company,* 98 Wash. 425; 167 P. 1115, when an insurance policy was issued on a vessel which was to sail beyond limits restricted in the policy. The issue was whether or not the agent knew where the vessel was to go when he wrote the policy and in that case again the Court held that the company was estopped to deny liability.

This doctrine of estoppel relative to insurance policies, where the agent writes and delivers a policy which on its face is contrary to known existing facts, has been the rule of the Supreme Court of Washington from the beginning.

In an earlier case of *Turner vs. American Casualty Co.,* 69 Wash. 154; 124 P. 486, where an agent wrote an accident policy after the assured had fully disclosed to him certain physical ailments, the Court at P. 160 uses the following language:

> "We are not unmindful of the fact that the federal courts and other courts have taken a contrary view. The substantive justice, however, of the view taken by this court from the beginning cannot be doubted. It gives notice to the insurance companies that they cannot turn loose upon the people a horde of incompetent or dishonest agents to exploit the policy holder, and then avoid the consequence of their acts by seeking refuge behind adroitly worded contracts."

In the case of *Stebbins vs. Westchester Fire Insurance Co.,* 115 Wash. 623; 197 P. 913, where the owner did not have clear title to the property insured, the Court again stated at P. 627:

> "It has also generally been held that, where an insurance agent issues and delivers a policy of insurance, which contains forfeiture clauses contradictory to the facts known to him at the time of the issuance of the policy, the company so issuing the policy will be held to have waived such inconsistent provisions and is estopped to defend by virtue of them."

REFORMATION NOT NECESSARY

We contend that this is an action at law, but under the rule of the state courts of Washingon if it be one of equitable cognizance, still the verdict of the jury is advisory and the judgment of the court should be in accordance with the findings of the jury.

In the case of *Miller vs. United Pacific Casualty Company,* 187 Wash. 629; 60 P. (2d) 714, a case hereinabove referred to, the court holds at p. 641 that it would be idle to remand the case for the mere formality of reformation. That such an agreement can and should be reformed and enforced in one proceeding. Likewise in *Gaskell vs. Northern Insurance Company,* 73 Wash. 668; 132 P. 643, where the complaint did not ask for reformation but alleged that appellant had notice and knowledge of the facts involved, stated at p. 676 that even though no de-

cree of reformation was entered the appellants were not prejudiced by it; and further on page 676 state as follows:

> "Authority is not wanting to the effect that, under the conditions here presented, a policy should be enforced wihout reformation on the ground that the husband took it as agent or trustee for the wife."

The case of *Carew, Shaw, etc.,* 189 Wash. 329; 65 P. (2d) 689, is not authority in support of appellants' contention for the reason that in that case the action was brought to reform and enforce the provisions of a policy in order to extend the coverage to something other than the thing insured by their contract. They had insured against burglary to an inner safe. The plaintiffs there attempted to collect for a loss of property in an outer safe, claiming an oral agreement to thus extend the terms of the policy. Plaintiffs' alleged mistake and fraud and recovered a verdict. The lower court entered judgment notwithstanding the verdict and in doing so apparently found that there was no mistake and no fraud. The court at p. 339 states as follows:

> "The trial court was in a better position than we to determine the credibility of the witnesses. The testimony was conflicting. In granting the motion for judgment non obstante veredicto and in entering the judgment of dismissal, there can be no conclusion other than that the trial court was of the view that mistake or fraud was not shown."

The supreme court holds with the lower court that mistake or fraud had not been shown by a clear, cogent, and convincing testimony. It follows therefore that this case in effect does not hold that a verdict could not have well stood had mistake or fraud been proven by that degree of evidence required by law.

In the case at bar no attempt was made by the appellees to show that anything was insured excepting the building covered and situated upon the numbered lots set forth in the policy or any other furniture than that contained in the same building. Neither did we attempt to show any other agreement than that contained in the policy. We did not attempt to extend the claim to some other lot or to property which may have been removed to some other building, which would be a case comparable to the case relied on by appellants.

Referring to the policy itself (See Tr. 77) it would seem that the designation of the property is intended to be considered as a warranty only, because, as set forth therein, it refers to the previous provisions of the policy and states that they are conditions which cannot be waived except by an officer of the company and in writing. Again, in the policy itself—(See Tr. 83) it is stated that:

> "If an application, survey, plan, or *description* of property be referred to in this policy it shall be a part of this contract and a warranty be the insured."

In other words, it is a warranty which can be waived. As above stated, the cases relied on by appellants are cases where it is attempted to show that something other than that contained in the policy was insured; that is, some other thing or the same thing at some other or different location. That would, of course, be an attempt to extend the policy and change the essential undertaking of the company.

In *Gattavara vs. Gen. Ins. Co. of America,* 166 Wash. 691; 8 P. (2d) 421 heretofore referred to, the Court held that an action of this kind is an action at law and at p. 695 states to the effect that even if it were an action of equitable cognizance still, it was discretionary with the trial court to submit that issue of fact to the jury. It will be noticed in this case that there was no prayer for reformation, and at p. 697 the court states that if there was a mistake in writing the policy and the agent had knowledge of the facts and the company failed to return the premium and the jury so found by its verdict, then the respondent was entitled to recover without reformation of the policy on the principal of estoppel and waiver.

Counsel cite the case of *Reynolds vs. Pacific Marine Fire Ins. Co.,* 98 Wash. 362; 167 P. 745, as authority for their position that estoppel cannot apply in cases of this kind. Singularly, the boat Arnold had three insur-

ance policies upon it, resulting in three separate cases which were passed upon by the supreme court of this state.

Reynolds vs. Canton Ins. Office, 98 Wash. 425; 167 P. 1115;

Reynolds vs. Pacific Marine Ins. Co., 105 Wash. 666; 178 P. 811.

In each of these cases the policies were identical and the loss was one and the same. In the case cited by counsel, 98 Wash. 362; 167 P. 745, there was a marginal notation warranting that the boat would not sail in certain waters. For the purpose of the appeal in that case it was admitted that the marginal clause was inserted with the authority and permission of the assured. We have in this state a statute which is found in Chapter 49, Laws of 1911, p. 197, and, as amended, is now carried forward to Rem. Rev. Stat. 7078, which states that no oral misrepresentation or warranty made in the negotiation of a contract or policy of insurance shall be deemed material or avoid the policy or prevent it attaching unless such misrepresentation or warranty is made with intent to deceive. The question therefore, presented to the court, was whether the rider limiting the waters in which the ship might sail was a warranty in contemplation of this statute or an *essential part of the contract.* The court

held that it was an *essential part of the contract* and that the plaintiff below could not recover.

In the next case, being the Canton case, found at 98 Wash. 425; 167 P. 1115, involving the same boat, the same loss, and the same restriction, the court found that where the assurer knew where the boat was going they were estopped to deny liability. This was an action befor a jury upon the policy *as written.*

The next case, being found at 105 Wash. 666, was a case where a broker took the application of the agent of the plaintiff below and procured the insurance from another agency. The court held therefore that the agent of the insurance company did not have knowledge where the boat was going because the broker acted as the agent of the owners and his knowledge was not imputed to the agent of the insurance company, therefore, the company was not estopped to set up the defense alleged, namely: that the boat had left the waters in which it was insured.

The court distinguishes this case from the Canton case and on p. 674 states:

> "Much reference is made in the briefs to the case of *Reynolds vs. Canton Ins. Co.,* above referred to, but in that case, as already pointed out, Waterhouse & Company was the agent of the company in writing the policy upon which the action was based, while

here it was a broker. There Waterhouse & Company, the agent of the insurance company, knew, or at least the jury had a right to find that it knew, that the boat was contemplating a voyage that would take it to the waters of Southwestern Alaska, and that its owners desired the insurance to cover it while in those waters."

Thus it will be seen that although the court has held this same provision to be an *essential part of the contract* in one case yet they have likewise held that the company may be estopped by knowledge of the facts which existed when they wrote the policy and took the premium in another.

THE QUESTION OF WHETHER OR NOT THE RISK WAS INCREASED BY THE SALE OF BEER AND WINE IS A JURY QUESTION

Counsel relies upon Washington cases, claiming that the Washington supreme court has decided that the changing of a dwelling into a roadhouse is a change in the use of the business.

There is no evidence here that a dwelling was changed into a roadhouse, but on the contrary that a hotel was conducted as a hotel and secured a license to engage in the lawful business of serving wine and beer to its patrons in connection with its general operations as any hotel.

The case of *Allen vs. Merchants Fire Insurance Com-*

pany, 179 Wash. 188; 36 P. (2d) 545, is not in point. In that case a dwelling house, insured as such, was changed into a public roadhouse, and the court held that inasmuch as notice of the change was given only in the escrow department of the bank and not to an agent of the company was not sufficient notice to the company. Further, the evidence was that the building was no longer used as a dwelling at all, but simply as a roadhouse.

Likewise the case of *Clark vs. Western Insurance Company,* 168 Wash. 366; 12 P. (2d) 408, relied on by counsel, was a place where a house was used exclusively to manufacture intoxicating liquor unlawfully, and that the fire resulted from an explosion in connection with a heating apparatus for the still.

The case of *McCulloch vs. Northwestern Mutual Fire Assn.,* 183 Wash. 5; 48 P. (2d) 217, is likewise a case where a dwelling house was used entirely as a place to manufacture intoxicating liquor. None of these cases are compatible with the facts in the present case.

On the contrary, the controlling law relative to the present case can be found in the case of *Ragley vs. Northwestern Nat. Ins. Co.,* 151 Wash. 545; 276 P. 537, where the court refused to grant judgment as a matter of law and instructed the jury that if they found the manufacture of intoxicating liquor was one of the principal uses of

the house, then the verdict must be found for the defendant.

See Insruction given by court, p. 548.

Further, discussing the question the court states:

> "When we consider the great number of uses which may be made of a house, and things which may be done therein incident to its occupancy as a home, it at once becomes apparent that the words "occupied only for dwelling-house purposes" are not capable of very exact meaning or application. We are of the opinion that the trial judge correctly instructed the jury, and correctly refused to give the unqualified instruction requested by counsel for appellant." (P. 548).

Likewise in the case of *Ada L. Hartman vs. Farmers Insurance Co.,* 163 Wash. 490; 1 P. (2d) 913, where a chicken brooder had been installed in the house but the evidence showed the fire had originated in another part of the house and that it did not actually increase the hazard. The court states:

> "Clearly, then, the court could not say, as a matter of law, the installation and use of the oven had increased the fire hazard. Therefore, the question became one of fact to be determined by the jury under proper instructions, and hence the court properly denied the motion for a non-suit." (P. 493).

It must be remembered that the business of selling wine and beer under the law of the State of Washington is a lawful business and not akin to running a still which

carries with it the fact that it is illegal and the fact that it is a dangerous fire hazard. In inquiring from the witnesses, to-wit: the adjuster and general agent as to the probability of increasing the misk, counsel assumed that this place was a public roadhouse and asked their opinion based on no knowledge of the facts surrounding the place itself. It is respectfully submitted that this was not a subject whereupon opinion evidence can properly be received. It was a fact to be decided by the jury upon the evidence produced in the light of all the surrounding circumstances testified by the witnesses upon each side of the case. It must be remembered that the appellants did not insure a dwelling but insured the building for the uses and purposes for which it was being used and was intended to be used, and inasmuch as they are estopped to deny the validity of this contract then likewise they are estopped to claim that the building should have been used for dwelling-house purposes only.

Counsel assumes throughout his brief that the testimony of the defense witnesses on the question of whether the risk was increased or not stands uncontradicted. We call attention to the testimony of Bessie Bilquist (Tr. 103), stating that the main business was serving meals, banquets, and renting rooms to week-end guests. Likewise (Tr. 104) that no additional fire hazard was created

by the addition of the beer bar. That the place was conducted no differently than before. See also testimony (Tr. 107). That the fire occurred on the opposite side from where the beer parlor was situated. To the same effect see (Tr. 108, 110); likewise testimony (Tr. 113), witness Nelson: that there was no trash around and plenty of ash trays were used. Testimony of the plaintiffs, taken altogether, shows the place to have been a quiet, orderly place. The little beer bar with six stools was not a principal part of the business but a minor addition, and appellant was not entitled to have an instructed verdict thereon.

INTEREST WAS PROPERLY ALLOWED

Appellant in his tenth assignment claims error in the allowance of interest. Appellees' complaint alleged that on the 3rd of December, 1936, the Proof of Loss was filed (Tr. 5). This was admitted. Under the terms of the policy no suit or action could properly be maintained until sixty days had elapsed thereafter. However, on December 17, 1936, the Proof of Loss was rejected (Ex. "B," Tr. 10). In allowing interest from February 6th the Court gave plaintiffs the benefit of the sixty-day period, which, in our opinion, they should not have had. Where no interest is fixed, the rate in the State of Washington is six per cent. (Rem. Rev. Stat. 7299).

The allowance of interest was never objected to in the court below, nor does the record show that this matter was raised or argued at all. It rather appears that it was an agreement of counsel that it was correct.

Under the law of Washington, insurance on real estate in cases of total loss must be paid in the full amount of the policy. In other words, we have a valued policy. See Rem. Rev. Stat. 7151.

It is true that the assured is only entitled to recover actual value for furniture destroyed. However, a list of furniture was attached to the complaint with its valuation. (See Tr. 8-9). When this list was introduced in evidence (Ex. 4, Tr. 97) the value was fixed at $1871. No issue was made of this value and no objection entered to the introduction of this evidence. The value of the equipment exceeded by $371 the amount of the face of the policy. The lower court allowed interest on the full amount of the policy without any argument or objection on the part of counsel.

The whole defense in this case was based upon the illegality of the contract, not upon any question as to the value of the property. Interest is recoverable upon all amounts that are capable in the ordinary way of correct ascertainment and this is true even as to an unliquidated

claim. *Yarno vs. Hedlund Box & Lbr. Co.,* 135 Wash. 406; 237 P. 1002.

Appellants' only question is as to the right to interest on the value of the furniture. This never having been in dispute or made in any way an issue it would follow that their claim is unfounded.

The judgment should be affirmed.

Respectfully submitted,

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